—IN THE—

United States Circuit Court of Appeals for the Ninth Circuit

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DAVID B. DRISKILL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. ~~3829~~ 3829

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Brief of ~~Plaintiff~~ Defendant in Error

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No. 3839.

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

Plaintiff in Error, who hereafter in this brief will be referred to as defendant, lived at 2248 West Washington Street, in the City of Phoenix, Arizona, with his family. Search warrant was secured for purpose of searching his residence for intoxicating liquors, and a Deputy United States Marshal, together with Special Agents of the Department of Justice, assisted by City Officers, went to the house to make search. Upon arriving at the house of defendant it was discovered that the search warrant contained a different number

than that of the residence of defendant. Upon this discovery being made, further search of said residence was deferred. Defendant Driskill also owned a house and lot across the alley and to the rear of his residence, which he had, nearly two years before the date of the search, rented to the Luttner family. On the morning of the search Special Agent Sisk saw the defendant pushing a trunk into the garage across the alley from defendant's home, and on the premises rented to Luttner, at a point where the trunk containing intoxicating liquors involved in evidence in this case was found, and Special Agent Sisk then secured permission from Mrs. Luttner to make a search of the garage, and found the intoxicating liquors and receptacles therein. Defendant Driskill, the same morning or the morning previous to the search, and before the search, had requested permission of Mrs. Luttner to place a trunk in the garage on the Luttner premises.

Defendant Driskill was indicted upon two counts and convicted upon one, as stated in brief of plaintiff in error.

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ARGUMENT.

But two assignments of error are made by counsel for plaintiff in error, first, that the Court erred in admitting in evidence the intoxicating liquor, bottles and receptacles, for the reason that the same were unlawfully seized from the premises and dwelling of the defendant. It will be noted that nowhere in the record is it made to appear that the defendant ever claimed the property so alleged to have been unlawfully taken from him without a search warrant.

There could be no unlawful or unreasonable search and seizure even though the premises of defendant below had been searched and property taken therefrom that belonged to another and not to the defendant. The Constitution of the United States only protects a person from unreasonable searches and seizure of his OWN property.

A petition for the return of the property taken from the garage on the Luttner premises was filed by defendant (Tr. 6), but nowhere in the petition was it alleged that the property so taken was the property of the defendant. Nor was there any evidence introduced to show such a fact. Issues were joined and a hearing before the Court had, and the trial Court found as a fact that the intoxicating liquors and other exhibits offered and received in evidence on the trial of defendant were taken from a garage on premises not a part of the premises of the defendant (Tr. 82), but that the garage belonged to the premises that had been leased to the Luttners. The Court having found this fact from the evidence before him, the Appellate Court will not disturb that finding of fact unless it is plainly shown by clear and positive proof that the finding of the Court was clearly against the weight of the testimony which is not made to appear in this record. The trial Judge, having the witnesses before him, is in a better position to judge as to the credibility of the witnesses and the weight that should be given to their testimony. This is so elementary as to need no citation of authorities, but a few are here submitted.

Dooley vs. Pease, 88 Fed. 446.
Dickey vs. Dickey, 94 Fed. 331.
Boardman vs. Toffey, 117 U. S. 271.
Stanley vs. County of Albany, 121 U. S. 535.
Keokuk & H. Bridge Co. vs. People State Ills., 175 U. S. 626.
Willard vs. Carrigan, 8 Ariz. 70 (68 Pac. 538).
Abanathy vs. Reynolds, 8 Ariz. 173 (71 Pac. 914).

It is conceded that the officers making the search and seizing the intoxicating liquors and other exhibits in evidence had no search warrant. Ample proof was adduced (Tr. 39-41) at the trial, and the trial Court found that (Tr. 82) none was necessary, permission to search the garage where the liquor was found by the officers having been given by Mrs. Luttner who was tenant of defendant in possession of the garage wherein the liquor was found. It is true that defendant owned the premises, but the same had been leased by him to the Luttner family, and the fact that he did not consider that he had joint control of the premises with the Luttner family is shown by the testimony which is not disputed by the defendant—that the defendant had, on the morning of the search or the morning previous to the search and seizure of the liquor, gone to the residence of Mrs. Luttner and secured her permission to put a trunk in the garage (Tr. 39). And such permission was given the defendant by Mrs. Luttner (Tr. 39-41). Mr. Luttner, in his testimony (Tr. 48), testified that he had leased the garage to one John Houston for the storage of some articles therein, and that Houston had agreed to pay him the rent therefor. There is no testimony in the record that defendant was ever given any part of that rent, nor that he ever asked for it, which also tends to disprove the claim that defendant had joint control

with Luttner of the garage wherein the intoxicating liquor was found.

Seasonable application was not made for the return of the intoxicating liquor and other property seized:

Weeks vs. U. S., 232 U. S., 383, 384.

Counsel for plaintiff in error in his brief at page 7 urges that the cases of

U. S. vs. Slusser, 270 Fed. 818;
Gouled vs. U. S., 255 U. S. 298, and
Amos vs. U. S., 255 U. S. 313,

are authority on the question of the unlawful search and seizure, and that the Amos case is authority upon the question of the seasonability of the application for the return of the property.

The Slusser case is not in point for the reason that in that case a garage on the premises of the residence of the defendant had been searched, while in the instant case the garage searched was upon the premises of the Luttners, and permission to make such search was secured from Mrs. Luttner. In the Gouled case prompt application had been made upon the first notice the defendant had of the seizure of his papers, while in the instant case the search and seizure was made on the 23rd day of April, 1921. and he was indicted, arraigned and entered his plea on the 27th day of April, 1921, and the application on return of property seized was not made until the 24th day of October, 1921. In the Amos case the property was taken from the defendant's home without any search warrant, and permission by the wife of de-

fendant to make the search was relied upon as obviating or waiving the necessity for a search warrant, while in the instant case no such state of facts exists. And in the Amos case there was no conflict in the evidence as to how the search and seizure had been made, the Government witnesses having described how the search was made of defendant's home without warrant either to arrest him or search his premises.

Counsel for plaintiff in error contends in his second assignment of error that the Court erred in overruling the motion of defendant for directed verdict, on the ground that the Government had not made a prima facie case. There was ample proof that the intoxicating liquors and bottles and other containers or receptacles had been taken from the garage which defendant claimed in his petition for the return of the property so taken was taken from his possession. Aside from the evidence of witnesses for the Government that the same was taken from the possession of defendant, he also alleges in his said petition that the property was taken from his possession, even though he does not claim the ownership of the property. This was sufficient to warrant the trial Court in submitting to the jury the question of whether or not the defendant had possession of the intoxicating liquors.

Mrs. Luttner testified (Tr. 39), "Driskill asked me if he could put a trunk in the shed and I said he could —that was before the trunk was put in there. The trunk and the barrel and bottles were taken away that day * * * think they were taken away by the officers. I had some conversation with Mr. Driskill about that time about this trunk and barrel. He was arrested then. He was arrested that day, and I think after he was released, why I went over there, and he told me he had been arrested, and how it was and all

that. He said something to me about a trunk and barrel being taken out of the shed or building. He said that they had found some liquor in it. He said, 'Did you leave them take it out?' and I said 'Yes'. He didn't say anything more about it then." The defendant testified he had access to the garage (Tr. 51). Deputy Marshal Weage testified (Tr. 63) "I took possession of the trunk and barrel after Mr. Sisk had handed it over to me. I saw where he got the trunk and barrel. He got it in this garage or barn opposite Driskill's place across the alleyway, directly in the rear, the place that belonged to Mrs. Luttner. The truck was ordered and I accompanied the truck driver with the barrel and the trunk and contents, and brought it to our office up here. At the time the barrel was taken out of the garage, the barrel and trunk, Mr. Driskill was sitting there in the car that Mr. Sisk had. The car was about one hundred feet up the alleyway from the garage. The trunk and barrel were loaded on the truck right in back of the garage as near the door as it was possible to get it. That was in plain view of the car where Mr. Driskill sat."

Mr. Sisk, in his testimony, (Tr. 76), testified defendant was pushing the trunk into the Southwest corner of the garage and in plain view. Also (Tr. 77) "He was pushing the trunk west against the corner wall. * * * the trunk was inside the door at the time but right on the door line and he was pushing it against the west wall."

We submit that the testimony quoted, together with the testimony of H. L. Goss (Tr. 93), furnishes sufficient justification for the Court to submit the ques-

tions of fact to the jury upon the charge of illegally possessing intoxicating liquor.

We respectfully submit that the judgment of the trial Court should be affirmed.

Respectfully submitted,

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